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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MANUEL PEREZ,

Defendant and Appellant.

B203619

(Los Angeles County  
Super. Ct. No. A783336)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Patricia Titus, Judge. Reversed.

David McNeil Morse, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief  
Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General,  
Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for  
Plaintiff and Respondent.

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Juan Manuel Perez appeals the judgment (order reinstating probation) entered after the trial court found Perez in violation of the conditions of probation imposed in 1988 following Perez's conviction of possession of a controlled substance, heroin. (Health & Saf. Code, § 11350, subd. (a).) Perez contends the evidence fails to show a violation of probation within the probationary term. (*People v. Tapia* (2001) 91 Cal.App.4th 738, 741-742.) We agree and reverse the order.

### **FACTS AND PROCEDURAL BACKGROUND**

#### *1. Perez is placed on probation in 1988.*

On November 7, 1988, Perez waived preliminary hearing and pleaded guilty to possession of heroin. (Health & Saf. Code, § 113550, subd. (a).)

The report of the probation officer prepared for sentencing indicates Perez had a prior conviction for sale of a weapon, a misdemeanor, in San Diego and that Perez was on probation in that case. Also, after his arrest on the possession of heroin case, Perez was arrested for auto tampering and Perez told the probation officer he had been convicted in that case. The report indicates Perez deserted probation when he was placed on diversion in the current case. The probation officer recommended probation with regular CII checks to determine if Perez suffers a new arrest.

On December 6, 1988, the trial court granted Perez probation.

#### *2. The trial court issues a bench warrant for Perez's arrest.*

A supplemental probation officer's report filed June 1, 1989, indicated a CLETS report received May 19, 1989, revealed no violations of probation. However, a supplemental probation officer's report filed December 6, 1989, indicated that on July 6, 1989, Perez was arrested in Bakersfield on a charge of driving a vehicle without the owner's consent. (Veh. Code, § 10851.) The report indicated Perez's probation would expire on December 5, 1991. Attached CLETS and JDS reports revealed no violations of probation.

The trial court noted at the bottom of the supplemental report that it had read and considered the report and handwrote the notation: “Prob rev; BW; no bail.”

A bench warrant for Perez’s arrest issued on December 6, 1989.<sup>1</sup>

3. *Perez is convicted of a new offense in Riverside County in 2007.*

On August 9, 2007, Perez appeared before the trial court in custody based on the warrant issued December 6, 1989. The report of the probation officer filed in connection with this appearance states that on August 2, 2007, Perez was convicted of possession of a controlled substance in Riverside County. The report noted that, in addition to the new offense, Perez was arrested “on a warrant for a matter that occurred [prior] to this grant of probation” and Perez failed to notify the probation department of his arrest on the warrant. The probation officer recommended reinstatement of probation, finding the sanctions imposed on Perez in the other new matter would be sufficient to serve the interests of justice.

4. *The trial court finds Perez in violation of probation.*

The trial court conducted a probation violation hearing on October 2, 2007. On that date, the trial court found Perez in violation of probation for failure to appear. The trial court reinstated probation with a new expiration date in 2009 and ordered Perez to report to the probation department within 48 hours.

Perez objected there had been no showing of a violation of probation within the probationary term. (*People v. Tapia, supra*, 91 Cal.App.4th 738.) The trial court noted there has been a warrant outstanding since 1989 and Perez had a new offense in Riverside in August of 2007.

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<sup>1</sup> A supplemental clerk’s transcript contains very poor quality copies obtained from microfiche archives of minute orders issued November 28, 1988, December 6, 1988 and December 6, 1989. The court reporter’s notes for November 7, November 28 and December 6, 1988 were destroyed after 10 years. (Gov. Code, § 69955, subd. (e).)

Defense counsel complained there was no evidence indicating the terms and conditions of probation or the circumstances under which Perez was required to appear. The trial court reiterated its reliance on the failure to appear. The trial court suggested it could continue the matter for proof of the recent Riverside conviction but opted instead to base the violation of probation on the failure to appear.

Perez appeals the trial court's finding.

### **CONTENTION**

Perez contends the trial court lacked jurisdiction to extend probation because the evidence did not demonstrate a violation of probation within the probationary term.

### **DISCUSSION**

#### *1. Governing principles.*

Summary revocation of probation must be based on facts in the probation report or other evidence from which it can be established that reasonable cause exists to find a violation of the terms of probation. (*People v. Smith* (1970) 12 Cal.App.3d 621, 626; Pen. Code, § 1203.2, subd. (a).) <sup>2</sup> When proper, the

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<sup>2</sup> Penal Code section 1203.2, subdivision (a), provides: "At any time during the probationary period . . . , if any probation officer or peace officer has probable cause to believe that the probationer is violating any term or condition of his or her probation or conditional sentence, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the person and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest. Upon such rearrest, or upon the issuance of a warrant for rearrest the court may revoke and terminate such probation if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation, . . . or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses. . . ."

revocation order serves to toll the running of the probationary period. (*People v. Tapia, supra*, 91 Cal.App.4th at p. 741.) However, a trial court cannot formally revoke a defendant's probation for a violation that occurred after expiration of the original probationary period. (*Ibid.*) To paraphrase *Tapia*, "[w]hen . . . there has been no violation during the period of probation, there is no [basis for revocation]." (*Id.* at p. 742.)

### 2. *Perez's argument.*

Perez contends the People failed to prove that Perez had been ordered to appear in December of 1989 and that he failed to appear. Consequently, the summary revocation in December of 1989 had no force and probation expired in December of 1991. Perez notes there is no record of the sentence imposed because the reporter's notes of the hearings have been destroyed and the microfiche copies of the minute orders are illegible. Perez concludes he is entitled to reversal of the order reinstating probation.

### 3. *Resolution.*

It appears Perez's argument is meritorious. A bench warrant issued December 1989 based on a suspected violation of probation arising out of the 1989 Bakersfield arrest for driving a vehicle without the owner's consent. However, at the probation violation hearing, no evidence of the facts underlying the Bakersfield arrest was presented. Thus, there was no showing of a violation of probation within the probationary term. The failure to appear on the bench warrant cannot constitute the violation of probation because there is no evidence in the record that Perez had been ordered to appear. Further, Perez was on a form of summary probation under which he was not supervised. Rather, the probation department periodically checked criminal records, CLETS, CII, and JDS, to determine if a violation of probation had occurred. None of the criminal records supplied to the trial court indicated Perez had been convicted of any new offenses within the probationary term. In sum, nothing in the record shows Perez violated probation within the probationary term by failing to appear or otherwise.

The issuance of a bench warrant, standing alone, does not prove a violation of probation.

4. *The People's theory of affirmance is not persuasive.*

The People seek to distinguish *Tapia*. They point out that in *Tapia* the trial court found the defendant in violation of probation based solely on the defendant's admission he failed to report to the probation officer upon his return to this country, which occurred after the probationary period ended. Because the defendant's probation expired before the admitted failure to report and there was no showing of any other violation within the probationary term, the defendant was entitled to discharge from probation. (*People v. Tapia, supra*, 91 Cal.App.4th at p. 742.)

The People assert that here the trial court determined, based on the trial court's records, that Perez failed to appear on December 6, 1989. Thus, a violation of probation within the probationary period was shown.

This court, on its own motion, ordered the superior court file for review in connection with the People's assertion that something in the court's file permitted the trial court to revoke probation. However, the copies of the file transmitted to us by the superior court clerk, to the extent they are legible, shed no additional light on the situation. In sum, absent any evidence Perez had been ordered to appear and he failed to do so, or that he committed a new offense within the probationary term, Perez is entitled to reversal of the order reinstating probation.

**DISPOSITION**

The judgment (order reinstating probation) is reversed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.